

## ATRT-2 – Background Document on gTLD Policy

There seems a fair amount of either confusion or lack of clarity related to the terms:

- Policy vs Implementation
- gTLD Policy Development Process (PDP)
- gTLD policy development (with or without the word “process”)

### *Policy vs Implementation*

The path from a conceptual goal in the gTLD space involves the development of a “Policy” followed by its implementation. The question that is at the core of this topic is whether any specific implementation detail constitutes a *change* in the original policy, or is a *detail* of implementation. In some cases, there is not even a formal policy, but rather a conscious or tacit decision on how to do things at the start of ICANN.

Once a policy is agreed to by the community and adopted by the Board, it must then be implemented. Until recently, such implementation was often the sole purview of ICANN staff.

For the new gTLD program, the “implementation” took many years and there were extensive consultations with the community as to how the policy should be implemented, since the policy itself was generally quite high-level and did not specify a lot of detail.

Much of the current debate centres around whether a specific implementation is indeed just that, or serves to alter the original policy. There is also an issue of once the implementation has been frozen for a sufficient time, it starts to become indistinguishable from the base policy.

It has become my (admittedly cynical) impression that in many cases, those who want a change see it as purely implementation, and those who are against it see it as a change to the core policy.

In more recent cases, implementation, while still a staff responsibility, includes sanity checks with the policy developers to ensure that the implementation is true to the intent of the policy.

### *GNSO Policy Development Process (PDP)*

The ICANN Bylaws defining the GNSO say:

*There shall be a policy-development body known as the Generic Names Supporting Organization (GNSO), which shall be responsible for developing and recommending to the ICANN Board substantive policies relating to generic top-level domains.*

The GNSO is currently composed of representatives of gTLD Registries, gTLD Registrars, Commercial organization involved in the use of the Internet for commerce, those involved in intellectual property issues, Internet ISPs and organizations and individual domain name holders interested in non-commercial issues, and three members appointed by the ICANN Nominating

Committee (one without a vote on Council). There is no voting representation of governments or Internet users.

This Policy Development Process is specified in some detail in Annex A of the Bylaws which begins with:

*The following process shall govern the GNSO policy development process ("PDP") until such time as modifications are recommended to and approved by the ICANN Board of Directors ("Board"). The role of the GNSO is outlined in Article X of these Bylaws. If the GNSO is conducting activities that are not intended to result in a Consensus Policy, the Council may act through other processes.*

As noted in the last sentence, this process MUST be followed if the result is to be a Consensus Policy, one which immediately upon adoption by the Board and implementation becomes an integral part of Registrar and Registry agreements. Such policies may cover only limited topics which are explicitly listed in the relative agreement, and generically referred to as topics “within the picket fence”.

Another important characteristic of a PDP-created policy is related to the level of support (or non-support). The concept is related to a “supermajority” vote. Such a vote requires 2/3 of the Board instead of a simple majority. A GNSO supermajority is a more complex calculation due to its two-house voting mechanism, but can be thought of as requiring about 2/3 support. For a PDP adopted by a supermajority of the GNSO, the Board MUST adopt the policy unless a supermajority of the Board believes it would not be in the interest of the ICANN community or ICANN and votes against it. So in effect, it only takes 1/3 of the Board to approve a PDP-created policy and there must be a substantive, demonstrable reason to not approve it.

There is some debate as to whether a PDP-created policy approved by only a majority of the GNSO and the Board has the weight of an enforceable Consensus Policy.

There is no explicit provision within the Bylaws for the Board modifying the result of a GNSO PDP – only adoption or rejection. However, recently there has been some acceptance of the concept of the Board taking other more detailed action.

### ***gTLD policy development (with or without the word “process”)***

Based on the last sentence of the introduction to Annex A of the ICANN Bylaws, the formal PDP must be used for Consensus Policy or if the GNSO is attempting to make it very difficult for the Board to overturn the resulting policy. For anything else, the GNSO is free to adopt less formal, less stringent or simply different processes. The resultant policy must still be approved by the GNSO Council, presumably demonstrating community support for the new policy.